

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

KERR WHOLESALE COMPANY

Employer ^{1/}

and

Case 9-RC-18063

TEAMSTERS LOCAL UNION 284, AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

Petitioner ^{2/}

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

I. INTRODUCTION

The Employer is a wholesale distributor of alcoholic and nonalcoholic beverages to customers in Southeastern Ohio from a facility located at Chillicothe, Ohio, the only facility involved in this proceeding. At this facility, the Petitioner currently represents the Employer's warehousemen, drivers and/or alternate drivers (shippers). In addition to the represented employees, the Employer employs numerous unrepresented employees at this facility. Specifically, the Employer employs nine salespersons, three merchandisers, two full-time clerical employees and two part-time clerical employees who are currently unrepresented. The managerial staff that directs and oversees the units of both the represented and unrepresented employees includes: General Manager Mike Waldron; Distribution Manager Ron Hand; Key Accounts Manager Steve Osborne; Sales Manager Randy Leeth and two Sales Supervisors, Dave Mead and Dustin Rigsby.

The Petitioner has filed a petition under Section 9(c) of the National Labor Relations Act seeking to represent all of the Employer's unrepresented employees: full-time salespersons, merchandisers and clerical employees. The Petitioner would exclude the part-time clerical employees from any unit found appropriate. The Employer, contrary to the Petitioner, argues that the unit sought is inappropriate because the classification sought by the Petitioner does not share a community of interest and, therefore, only separate units of the classifications of employees are appropriate. A hearing officer of the Board held a hearing on the various issues and the parties filed briefs with me.

I have considered the evidence and the arguments presented by the parties on the appropriateness of the unit and I have concluded for the reasons discussed below that a unit

^{1/} The name of the Employer appears as amended at the hearing.

^{2/} The name of the Petitioner appears as amended at the hearing.

consisting of all salespersons, merchandisers and clerical employees is appropriate for the purposes of collective bargaining. I have also concluded that the part-time clerical employees share a substantial community of interest with the full-time employees and are eligible to vote in the election. Accordingly, I have directed an election in a unit among the employees in the classification consisting of 16 employees. To provide a context for my discussion of those issues, I will first provide an overview of the Employer's operations. I will then present in detail the facts and reasoning that supports each of my conclusions on the issues.

II. THE EMPLOYER'S OPERATIONS

The record reflects, as previously noted, that the Employer has a warehouse facility in Chillicothe, Ohio from which it distributes alcoholic and nonalcoholic beverages to customers in several counties throughout Southeastern Ohio. ^{3/} The Employer employs warehousemen, drivers and skippers at this facility. These employees, a total of 17, are currently represented in a single unit by the Petitioner. The record discloses that these employees are supervised by the Distribution Manager Ron Hand who, in turn, reports to General Manager Mike Waldron.

Salespersons:

The salespersons are responsible for selling and taking orders for the products handled by the Employer. They are assigned to and responsible for a given territory, calling upon and taking orders from all the customers within their area of responsibility. They normally start their day at about 7 a.m., but have no set hours and leave from and return to their homes rather than reporting to the Employer's facility. The Employer holds a sales meeting every other Friday at which time the salespersons are required to be at the facility. They each have a desk in the "upper floor sales area." When they are not calling on customers or potential customers they occasionally are at the facility but have no predetermined scheduled times to be there other than the Friday sales meetings.

The salespersons use their own personal vehicles in driving to the customers' locations and receive a stipend from the Employer to compensate them for such use. The Employer provides the salespersons with "uniforms," which may include shirts bearing a supplier's logo. The salespersons are supervised by the sales supervisors, who, in turn, report to the sales manager. A merchandiser may occasionally fill in for a salesperson who is ill or otherwise unavailable. Salespersons are paid exclusively on a commission basis, which is determined by percentage of their total sales. The salespersons may also be eligible to receive bonuses from the Employer, by meeting specified sales goals. In addition, the Employer's suppliers will sometimes offer salespersons incentive payments, trips or clothing for obtaining sales goals. The salespersons are not required to record their time, may stop for lunch whenever they choose, and have no set schedule. They are subject to and work under the policies, procedures and benefits described in the Employer's handbook. ^{4/}

^{3/} The record does not contain a physical description of the Employer's facility.

^{4/} At the hearing and in its brief the Employer objected to the receipt of the "Handbook," Board Exhibit 3, into evidence on the basis that a proper foundation had not been made for its receipt. I find merit to the Employer's objection. Therefore, my findings are not based on the contents of the purported "Handbook" but instead on other record evidence.

Merchandisers:

The merchandisers, who work on a salary basis, report to the facility at approximately 7 a.m. While at the facility the merchandisers work in the “sign shop” which is located “upstairs” by the sales area where they make the signs and/or materials needed for the product displays. They drive a company vehicle to the customers’ locations where they set up the displays. The merchandisers normally work about an 8-hour day and return to the facility after they have completed all of their scheduled displays.

Of the three merchandisers one handles non-alcoholic merchandise and reports to the key Accounts Manager Steve Osborne. The other two merchandisers handle the alcohol products and report to the sales manager. They all receive a clothing allowance from the Employer and are subject to the same employee handbook containing rules and benefits as are the salespeople and the clerical employees. When a vacancy occurs in sales, merchandisers may bid on and have been awarded such positions in the past.

The record reflects that merchandisers have work related interaction with the other employees at the Employer’s facility. They often coordinate their trips to a customer’s facility with the drivers, inasmuch as a driver’s truck may be loaded with materials needed by the merchandiser to set up a display. Because the merchandisers are at the facility on a daily basis, they occasionally interact with the clerical employees. The front office contains a printer and a copier which is used by the merchandisers, as well as the clerical employees. They also retrieve their messages from the message board in the reception area. Occasionally, merchandisers deliver a product to a customer and receive money, which they give to one of the clerical employees.

Likewise, the merchandisers have contact with the salespersons during the day. For example, if they have to make a delivery to a customer, they may coordinate the delivery of the display or banner with and/or get directions from the salespersons. If a salesperson convinces a customer to have a display of the product, the salesperson contacts the supervisor at the Employer’s facility. A driver puts the required materials on a truck, and a merchandiser goes to the customers’ location to construct the display. If a salesperson persuades a customer to have a banner or display of a product, the merchandiser makes the banner at the Employer’s facility and erects it at the customer’s location. General Manager Waldron described the process as one “transaction;” that is, the salespersons *sell*, the drivers *deliver*, and the merchandisers *construct* the displays and banners for the Employer’s product. As with the salespersons, the merchandisers may stop for lunch whenever it is convenient and are expected to take about a 1-hour lunchbreak.

Clerical Employees:

The Employer employs two full-time clerical employees. One is in charge of inventory control and conducts the physical counting on the (warehouse) floor each day and balances the inventory. She is also responsible for the accounts receivable, communicates product pricing to the customers, and shares an office with the distribution manager who, as noted above, is responsible for the warehouse. The other full-time clerical acts as the receptionist and sits at the reception desk at the front door and answers incoming calls, directs the calls, and takes messages. In addition, the receptionist may drive the Employer’s van to the bank to make

deposits. The record also reflects that she makes a “small” number of telephone sales of product to customers. At the request of the salespersons, she generates a sales report history. She also makes “key” sales to customers who come in person to the facility. She also compiles commission reports which is forwarded to the payroll department.^{5/} She is involved in the monthly report of sales buy, and inventory of suppliers. The two full-time clericals have been cross-trained in their jobs and substitute for each other on an as-needed basis. They are both hourly paid, have 1-hour for lunch, and log their time on time sheets. They are not required to wear any special clothing and are supervised by the general manager.

Both full-time clerical employees interact with the salespersons on a daily basis. They communicate with salespersons concerning issues as verification of a license, bad checks or any problems the salesperson may be having to contacting a customer or finishing their route. On a typical day, one or the other of the full-time clerical employees will spend 10 to 15 minutes talking to each salesperson and exchanging information with them.

The Employer also employs two part-time “route accounting” clerical employees who work alternate days from approximately 4 p.m. until 8 or 9 p.m., for a total of about 20 to 25 regularly scheduled hours per week. They are hourly paid, spend all of their time at the facility, and their primary duty is to “settle” the drivers’ accounts upon their return to the facility. Thus, they verify that the amounts of money the drivers collected from customers match the invoices filled that day.^{6/} They also answer the phone and if a customer calls or a special order comes in, they process it and put it into the system.

As previously stated, the Employer has a handbook and/or policy manual that governs the terms and conditions of employment for all clerical employees, salespersons and merchandisers. The record indicates that with the exception of pay and how the employees are paid for holidays, and vacations, the provisions of the handbook applies equally to all employees.^{7/}

Applicable Law and Conclusion:

Where an employer’s only non-represented are those in the classifications sought by a petitioning union, the petition is treated as a request for a residual unit of all unrepresented employees and an election may be directed in that unit. *Building Construction Employers Association*, 147 NLRB 222 (1964); and *Eastern Container Corp.*, 275 NLRB 1537 (1985). Specifically, groups of employees omitted from established bargaining units constitute an appropriate “residual” unit, provided that it includes all the unrepresented employees of the type covered by the petition. *GL Milliken Plastering*, 340 NLRB 1169 (2003); *Camel Buddig and Company*, 328 NLRB 929 (1999); and *Fleming Foods, Inc.*, 313 NLRB 948 (1994).

Resolution of unit composition issues, like those here, begin with an examination of the petitioned-for unit. Only if it is inappropriate, will alternative units be found. *Bartlett Collins*

^{5/} Payroll and other human resources’ functions are sent to and performed at a different facility located at Athens, Ohio.

^{6/} In the event that any of the drivers return to the facility before the route accounting clerical has reported to work, one of the full-time clericals performs the verification.

^{7/} The part-time employees do not receive benefits beyond their wages.

Company, 334 NLRB 484 (2001). In determining whether the unit sought is appropriate the Board is guided by the principal that the unit only need's to be appropriate and does not necessary have to be the most appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), enf'd. on other grounds 190 F.2d 576 (7th Cir. 1951). The appropriateness of a unit normally depends upon community of interest factors such as mutuality of interest in wages, hours and working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange; and functional integration. *Ore-Ida Foods*, 313 NLRB 1016 (1994).

Here, record evidence establishes that the merchandisers share a community of interest with the salespersons inasmuch as they significant have work related interaction; are subject to the same employee handbook; work away from the Employer's warehouse; take lunch breaks, like the salespersons when it is convenient; and, are part of the "one transaction" described by the general manager with regard to the delivered product. I am cognizant of the distinctions between these two groups of employees. For example the method of payment and the time they spend at the facility. However, these distinctions are, in my view, outweighed by the functional interaction between the salespersons and merchandisers in the sale of the Employer's products and the other record evidence demonstrating the strong community of interest between the salespersons and merchandisers. Accordingly, I find that the merchandisers may properly be included in the unit with the salespersons.

The record also establishes that the "clericals" share a sufficient community of interest with the salespersons and merchandisers to warrant therein inclusion in the same unit. Although the record suggests that the clericals perform some typical office clerical work, it is clear that such office work is minimal or commingled with the many traditional warehouse clerical duties regularly performed by the clericals. Thus, their warehouse-related duties along with their frequent beverage distribution-related contact with the other "unit" employees and the salespersons and merchandisers shows that the clerical jobs are integrally related to the distribution of the Employer's product as is the work of the other "unit" and petitioned-for employees.^{8/} Accordingly, it is clear that the clericals performed substantial work directly related to the warehouse and salespersons and share a sufficient community to warranty their inclusion in the unit.

Based on the above and the record as a whole, excluding the clericals whose interests are aligned with the other employees from a residual unit of unrepresented employees is unjustified. The cases cited by the Employer in its brief do not compel a different conclusion. The Board has found no merit to the argument that different groups of employees cannot be included in one overall unit merely because, if petitioned for separately, they might arguably constitute separate appropriate units. See, *Livingstone College*, supra. Here, the Petitioner is requesting the inclusion essentially all unrepresented employee in a residual unit. The Board has long held that the Act requires only that the unit requested be *an* appropriate unit. *Livingston*, supra, citing,

^{8/} Even if the clerical employees perform traditional office clerical duties, that alone would not be a basis for excluding them from the unit. Although the Board ordinarily does not include office clerical workers in a unit containing manual workers because of their different interests, this policy is less applicable in a small nonindustrial setting such as this one. See, *Livingstone College*, 290 NLRB 304 (1988); *Berenson Liquor Mart*, 223 NLRB 1115 (1976). Thus, the Board has found them to be properly included in a unit in situations where the office clericals have strong mutual interests with the other employee groups, and has relied upon such factors as frequent contact, being subject to the same personnel policies, and receiving the same benefits.

Morand Bros. Beverage Co., supra. Accordingly, I find that the “residual unit” sought by the Petitioner, including the clerical employees is appropriate.

Contrary to the Petitioner’s position, however, I find that the two part-time clericals are regular part-time employees and must be included with the full-time clericals in the same unit. The two part-time clericals, as previously noted, hold one job and alternate workdays. Even though they work fewer hours than the full-time clericals they are appropriately included under any of the Board’s tests for regular part-time employees.^{9/}

Stipulations of the Parties:

In accordance with the stipulation of the parties, and based on the record, I find that the following individuals are supervisors within the meaning of Section 2(11) of the Act and will excluded them from the unit: Mike Waldron, General Manager; Ron Hand, Distribution Manager; Steve Osborne, Key Accounts Manager; Randy Leeth, Sales Manager; Dave Mead, Sales Supervisor; and Dustin Rigsby, Sales Supervisor.

Conclusions as to the Unit:

The Employer, in its brief, notes that the salespersons, merchandisers and clericals do not share common supervision. Common supervision is but one of many factors the Board considers in determining whether a community of interest exists and there is no per se rule. See, *Aerospace Corporation*, 331 NLRB 561 (2000). The Employer also cites *Home Depot USA, Inc.*, 331 NLRB 1289, 1290 (2000), on the basis that the employees’ different working hours and schedules weighs against including them in the same unit. However, it is clear that the working hours of employees is merely a factor to be considered and is not above dispositive of the issue. I have considered, as discussed in detail above, the different work schedules of the employees and I do not find them to be so dissimilar as to destroy the community of interest that I find the employees share. Finally, I have fully considered the Employer’s other arguments raised in its brief, to wit, the lack of shared job functions, different work sites, different vehicle policies, different methods of calculating wages, different uniforms, different skills, qualifications and training, insufficient functional integration, and industry practice. As I have previously stated, the Board considers various factors in determining whether a group of employees share a sufficient community of interest to warrant their inclusion in the same bargaining unit. The presence or absence of one or more factors is not controlling. I conclude and the record shows, that the work these various groups of unrepresented employees perform is integrally and related to the distribution of the Employer’s product, and that they share a substantial community of interest and that the differences between these groups of employees on the whole, do not render the unit sought by the Petitioner inappropriate for collective bargaining. Accordingly, I will direct an election in the unit found appropriate.

^{9/} The Board has stated that part-time employees are included in a unit with full-time employees whenever the part-time employees perform work within the unit on a regular basis for a sufficient period of time during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing interest in the wages, hours and working conditions of the full-time employees in the unit. See, *New York Display and Dye Cutting Corp.*, 341 NLRB 930 (2004); *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003); *Fleming Foods, Inc.*, Id; *Pat’s Blue Ribbons*, 286 NLRB 918, (1987).

III. CONCLUSIONS AND FINDINGS

Based on the foregoing, the entire record and briefs of the parties, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing, except as otherwise noted, are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims to represent certain employees of the Employer.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a Unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All salespersons, merchandisers and clerical employees employed by the Employer at its Chillicothe, Ohio facility; but excluding all other employees, all professional employees, guards, managers and supervisors as defined in the Act.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Local Union 284, affiliated with the International Brotherhood of Teamsters. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **May 19, 2006**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request

must be received by the Board in Washington by 5 p.m., EDT on **May 26, 2006**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 12th day of May 2006.

Gary W. Muffley, Regional Director
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